SUPREME COURT, U. S.

Office-Supreme Court,
FILED
NOV 3 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 138.

MORRIS R. BLANE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR RE-HEARING.
(On Order Denying Certiorari.)

MORRIS R. BLANE,
Petitioner Pro Se.

JAMES J. CARROLL,
75 Public Square,
Cleveland, Ohio 44113,

JOHN R. JEWITT, JR.,
717 Superior Avenue, N. E.,
Cleveland, Ohio 44114,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 138.

MORRIS R. BLANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING.
(On Order Denying Certiorari.)

This petition for re-hearing on the order of the Supreme Court entered October 9, 1967, denying certiorari to the United States Court of Appeals for the Sixth Circuit is filed herein pursuant to Rule 58 (2) of the Rules of the Supreme Court under that portion of the Rule entitling a petitioner to petition for re-hearing on "* * * other substantial grounds available to petitioner although not previously presented."

The grounds for this petition rest upon the premise that petitioner was convicted and sentenced upon four (4) counts of a five (5) count indictment charging unlawful bankruptcy practices solely upon the testimony of a former client, who prior to and at the time of trial of the case was a psychopathic personality residing in a mental hospital under a varying diagnosis of "schizophrenic reaction, chronic, undifferentiated type," and "schizophrenic reaction, chronic, schizo-affective type."

Reference is made to a portion of the testimony of a psychiatrist on voir dire concerning the mental aber-

rations of the Government's chief witness, Harold I. Slote, reproduced in the Petition for Certiorari at page 6. The question now presented, however, was not developed or argued in the Petition for the Writ although the mental disability of the proffered witness was strenuously argued by counsel for the petitioner in the District Court.

By way of preamble as to the importance of the problem, it is suggested in the first instance that petitioner is an attorney who has practiced continuously in Cleveland, Ohio, for some thirty-three (33) years without any blemish on his record. A sampling of the clientele of any attorney practicing in a large metropolis will reveal, in addition to the ordinary level-headed client, the ever-present neurotic and even psychotic individual together with the out-and-out criminal. One counsels and litigates cases for the injured client, recognizing ofttimes the overtones of anxiety neurosis; one defends the criminal case and can hardly practice in this field without recognizing the sociopathic and psychopathic traits of the criminal mind. Further, one spends a considerable amount of time counselling and more often wet-nursing and humoring the neurotic who has only an imaginary legal problem. This is the very nature and also the sometimes fascinating reward of the profession. These experiences add considerable levity to luncheon discussions with other attorneys and there is hardly an attorney worth his salt who does not have a handful of so-called "crackpots" as clients. Mindful of the hazards of such a varied practice, the cautious attorney purchases liability insurance to insulate himself as best he can. In the limbo of his imagination, however, there is always the realization that a dissident and ofttimes neurotic client will go to the Bar Association or even file a malpractice suit.

Notwithstanding the above, it is virtually incomprehensible to any attorney that he will be indicted, convicted and sentenced to eighty (80) months upon the testimony of a former client who is not merely neurotic but a conceded psychopathic personality. Perhaps the average attorney takes refuge and consolation in the fact that there appear to be no reported cases where such a catastrophe has occurred.

However, now that it has all become a reality to petitioner, this Court should exercise its supervisory power and determine in the light of psychiatric advancement the real extent to which a voir dire ought to be conducted in a case where the trial judge, the District Attorney and defense counsel have the unequivocal knowledge prior to trial that the Government's chief witness, without whom a conviction could not be supported, is shown to have a long-standing history (since 1944 in the case at hand) of a mental disease ranging from an initial diagnosis of anxiety neurosis to chronic schizophrenic reaction.

Petitioner would undoubtedly be less vehement in this contention if the character of the mental affliction bore no reasonable or rational relationship to the type of testimony he was called upon to give. However, in the instant case, the very nature of the affliction, viz. chronic schizophrenic reaction, suggests that the witness was suffering from a mental disease, the manifestations of which to quote a portion of the testimony of the psychiatrist who testified:

> "* * * Despite seeking advice from many sources, he attempts to give the impression of great independence and self-sufficiency. In order to do this, he frequently distorts the facts and attempts to cover up his feelings of doubt, weakness and inadequacies."

It is significant to note that the following appears on page 129 of *Steckers Fundamentals of Psychiatry*, 6th Edition, J. B. Lippincott Company, concerning schizophrenia:

> *"Since the ego must be absolved the blame for failure is projected outside the individual onto others or the condition of things."* (Emphasis added.)

The testimony ultimately received from this witness sought to transfer to petitioner, former attorney of the witness, all of the responsibility of the misfeasance of the witness in secreting assets that should have been disclosed to the trustee in bankruptcy. The insinuation was made that the concealment of such assets was part of an overall scheme which was solely the handiwork of the witness's attorney.

This is exactly the type of testimony which can be counted upon from a schizophrenic personality: the transference of blame for one's own failures and errors to another in order to cover his own feelings of doubt, weakness and inadequacy!

The trial judge should have addressed himself to the proposition as to the type of testimony which the Government intended to elicit from the witness. If that testimony tended to exculpate the witness and implicate petitioner, then the trial court should have conducted searching inquiry as to whether or not such exculpatory testimony would be a natural consequence consistent with a person suffering from a schizophrenic reaction. If psychiatric testimony answered this question in the affirmative, which it most certainly did in this case, the trial judge should not have been content with the fact that the witness "appeared to be well oriented" and "had good contact with reality" as a basis for finding the witness to be competent. As an example, a psychopathic liar may be thoroughly oriented and have good contact with reality but he is nonetheless

somewhat anti-factual. It is urged that the trial court completely abused its discretion in finding this witness to be competent with the result that the petitioner was most assuredly deprived of due process of law.

If the psychopathic criminal is to be sheltered under one protective wing of Due Process, the other wing must afford the same protection to a mentally competent individual who is preyed upon by the psychopath. If this protection does not have reciprocal effect, it is meaningless!

Does the acceptance and application of the testimony of a mentally afflicted and institutionalized Government witness comport with the requirements of due process and with the protective concept thereof?

Although "due process" is a somewhat ephemeral concept welded to legal reality by the holdings of this Court and others, as defined in the excerpts hereinbelow quoted, it would appear evident that a conviction predicated primarily upon the psychotically-motivated testimony of a Government witness suffering from a mental disease, viz. chronic schizophrenic reaction, cannot be justified if "due process" is to have any significance in controlling the prosecution efforts of the sovereignty and in protecting the individual from that which is arbitrary, unfair or constitutionally tainted.

This Court has stated in *Rochin vs. California*, 342 U. S. 165, 169, 173, 96 L. ed. 183, 72 S. Ct. 205, 25 A. L. R. (2d) 1396 (1951):

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) *in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of Eng-*

lish-speaking peoples even toward those charged with the most heinous offenses.' * * * These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are *'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' * * * or are 'implicit in the concept of ordered liberty.'"* (Emphasis supplied.)

"Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that *convictions cannot be brought about by methods that offend 'a sense of justice.'"* (Emphasis supplied.)

In *Wolf vs. People of Colorado*, 338 U. S. 25, 27, 93 L. ed. 1782, 69 S. Ct. 1359 (1949), this Court, speaking of the continuing viability of "due process of law," pronounced:

"Due process of law thus conveys neither formal nor fixed nor narrow requirements. *It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society.* But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (Emphasis supplied.)

It is submitted that a conviction had upon the testimony of an institutionalized schizophrenic, and the admission into evidence of such testimony is offensive to a "sense of justice"; is inconsistent with "those canons of

decency and fairness which express the notions of justice of English-speaking peoples * * *"; is the antithesis "of those personal immunities which are rooted in the traditions and consciences of our people"; is not within the "concept of ordered liberty"; and is destructive of those considerations which are "basic to our free society."

It is submitted that the sixth amendment right to confront—to cross-examine—one's accuser is meaningless if the accusatory testimony is that of a mentally diseased witness. There can be no effective cross-examination of a schizophrenic personality.

In *Estes vs. Texas*, 381 U. S. 532 (1965), this Court very recently set aside a conviction despite the absence of any showing of prejudice. The Court stated at 542-543:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

The Court further cited with approval the language of Mr. Justice Black for the court *In re Murchison*, 349 U. S. 133, 136 (1955), that "our system of law has always endeavored to prevent even the probability of unfairness."

If identifiable prejudice within the concept of "due process" be required to grant this petition, notwithstanding the language of *Estes* (*supra*), it is clearly demonstrated in this case.

The trial court found this witness to be competent to testify when in fact he had been residing in a mental hospital for five (5) continuous months prior to trial and was in such a condition that he was personally conveyed from the hospital and back each day throughout his testimony by the Justice Department; that the witness at the time of

the trial and for some months prior thereto was receiving a one hundred (100) percent mental disability pension from the Veteran's Administration; that the witness was "staffed" (meaning his case was reviewed) at the instance of the Government on January 6, 1965, some twelve (12) days before his testimony at trial, whereupon the diagnosis of his mental condition was revised from "schizophrenic reaction, chronic, undifferentiated type," to "schizophrenic reaction, chronic, schizo-affective type," in an obvious effort to place him in a less severe category of mental diseases as classified by the American Psychiatric Institute. See text: *Psychology, Psychiatry and Law* by Katz, Goldstein and Dershowitz © 1967 at page 506. The fact of the matter is that there is no slight legerdemain or manipulation which could possibly remove the basic diagnosis of schizophrenic personality of a serious degree.

CONCLUSION.

The petitioner's rights to due process of law and to an effective confrontation of witnesses under the provisions of Amendments V and VI to the Constitution of the United States have been abridged in this matter.

It is submitted that a conviction, based primarily upon the testimony of an institutionalized schizophrenic necessarily violates all considerations of due process of law—"those canons of decency and fairness which express the notions of justice of English-speaking peoples"—those personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental * * * or are implicit in the concept of ordered liberty."

It is submitted that the privilege of confronting—of cross-examining—an institutionalized schizophrenic falls far short of the effective cross examination which is contemplated and guaranteed under Amendment VI to the

Constitution of the United States, and that such testimony should not have been allowed by the trial court.

WHEREFORE, petitioner prays that this petition be granted and that a writ of certiorari issue from this Court to the United States Court of Appeals for the Sixth Circuit, and that he be given leave to present these matters on their merits.

Respectfully submitted,

MORRIS R. BLANE,
Petitioner Pro Se.

JAMES J. CARROLL,
JOHN R. JEWITT, JR.,
Attorneys for Petitioner.

CERTIFICATE OF PETITIONER AND COUNSEL.

Pursuant to Rule 58 of the Supreme Court of the United States, we hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not for the purpose of delay and is restricted to the grounds specified in paragraph 2 of Rule 58.

MORRIS R. BLANE,
Petitioner Pro Se.

JAMES J. CARROLL,
Attorney for Petitioner.